No. 87-713

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SLAVKO ANDRIJEVIC, a/k/a AL ANDRIE,

Petitioner,

—v.—

C. RUSSELL KELLERAN, JR.,
EIGHTEEN MILE CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF AUTHORITIES

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By not even addressing Petitioner's argument that the lower courts are sharply divided on whether state court judgments must always be given unquestioned deference in bankruptcy (see Petition 33-39), the Brief in Opposition confirms that this case merits review. For no amount of rhetoric about the alleged clarity of the law can mask the fact that the questions

presented here are important ones, that the questions frequently recur, and that the lower courts are at sea as to how to resolve them.

Respondents' argument essentially boils down to this: The Court's enunciation of two exceptions to full faith and credit in Heiser[1] -- i.e., fraudulent procurement of the judgment or lack of jurisdiction -- was intended to divest the bankruptcy court of any equitable power to examine a state court judgment for other reasons. But if the law was so settled, why did Brown[2] find a third exception? And while the additional exception in Brown may have involved "dischargeability," Brown's rationale -- that the case involved "the type of question Congress intended that the bankruptcy court would resolve," 442 U.S.

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1 Heiser v. Woodruff , 327 U.S. 726 (1946).

2 Brown v. Felsen, 442 U.S. 127 (1979).

at 138 -- suggests that Congress may have intended that other bankruptcy issues also fall within the exception to full faith and credit.

In fact, as this Court emphasized not only in Brown but also in Marrese,[3] whether a particular grant of exclusive jurisdiction justif[ies] a finding of implied repeal of § 1738 . . . depend[s] on the particular federal statute involved and the nature of the claim or issue involved in the subsequent federal action." 470 U.S. at 386 (emphasis added). But that mode of analysis -- a search for "the intent of Congress," id., rather than a search for pigeon-holes -- can nowhere be found in the panel majority's opinion or in the Respondents' brief.

Judge Blumenfeld's dissenting opinion undertakes the careful examination

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3 Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985).

of Congressional intent which this Court mandated in Brown and Marrese. Neither the majority opinion nor the Brief in Opposition has any answer to Judge Blumenfeld's contention that the allowance of Respondents' claim would frustrate the fundamental purpose of the bankruptcy laws -- which is to assure "equality of distribution" among competing creditors[4] -- by stripping the bankruptcy court of even the most limited discretion to examine state court judgments, even when necessary to protect third party creditors who were not participants in the state proceeding. Pet. App. 34A-36A.

Indeed, the plain language of 11 U.S.C. § 502(b)(1), authorizing the bankruptcy court to disallow a claim if it is "unenforceable . . . under any agreement or

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4 Pet. App. 20-A quoting Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941).

applicable law," and 11 U.S.C. § 105, conferring broad equity powers upon the bankruptcy court,[5] appear to codify this Court's holding in Pepper that a bankruptcy court "may look behind the judgment to determine the essential nature of the liability for the purposes of proof and allowance."[6]

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5 In analyzing the breadth of the bankruptcy court's authority under § 105, courts have noted that "[i]n extraordinary circumstances the equitable powers of this Court may be utilized to prevent injury or correct errors ...." In re Marine Power & Equipment Company, Inc., 71 B.R. 925, 930 (W.D. Wash. 1987) (quoting In re Wood, 33 Bankr. 320, 322-23 (Bankr. D. Idaho 1983)).

6 Pepper v. Litton, 308 U.S. 295, 305-306 (1939). Significantly, sections 105 and 502 were enacted after Heiser. Thus, even if Heiser intended to limit Pepper in the manner respondents contend (and it did not), subsequent legislation would have overruled Heiser and reinstated Pepper. See also Brown, 442 U.S. at 139 n.10 (questioning Heiser's continued vitality in certain contexts).

The majority's sweeping divestiture of the bankruptcy court's statutory power to determine claims and of its broad equity powers should not be sanctioned without a careful review of Congressional intent by this Court. Considering the importance of the question presented, and the conflicting views of the lower courts on this recurring problem, the grant of certiorari is certainly appropriate.

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Respectfully submitted,

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